

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Supra Telecommunications & Information Systems, Inc. ("Supra"))	
Pursuant to Section 252(e)(5))	WC Docket No. 02-238
of the Communications Act)	
)	

**BELLSOUTH OPPOSITION TO SUPRA'S PETITION PURSUANT
TO SECTION 252(e)(5) OF COMMUNICATIONS ACT**

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BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively "BellSouth"), submits the following Opposition to Petition of Supra Telecommunications & Information Systems, Inc. ("Supra") Pursuant to section 252(e)(5) of the Communications Act ("Petition").

The Commission should deny Supra's Petition on four grounds. First, the Florida Public Service Commission ("FPSC") fulfilled all of its responsibilities under the Act. The facts overwhelming support this conclusion.¹ Second, Supra's allegations that the agreement does not reflect the resolution reached by the parties for negotiated and withdrawn issues are false. The facts demonstrate that these allegations are fabrications made up by Supra to avoid signing a new agreement. Third, the FPSC is not required to consider and offer resolution on issues that the parties have already resolved. Fourth, by filing an action in federal district court appealing the action taken by the FPSC, Supra is barred from also seeking preemption from the Commission.

¹ See Attachment 1, Affidavit of Gregory R. Follensbee.

I. Introduction and Summary

While the Telecommunications Act of 1934, as amended (the “Act”), may not be a “model of clarity,”² there is at least one section that does not fall to the level of “ambiguity” or “self-contradiction.”³ section 252(e)(5) and (6) very clearly sets forth the standard for determining when the Commission may preempt the authority of a state commission. Unless that standard is met, the Commission cannot cross the jurisdictional line and usurp a state commission’s decision.⁴ Without doubt, that standard has not been met in Supra’s request for preemption. Not only do the *actual* facts not justify preemption, but also even if the Commission were to accept every twisted fact stated in Supra’s Petition as the absolute truth, as a matter of law the Commission still could not take over and reverse a decision made by the Florida Public Service Commission (“FPSC”).

Stripped of its rhetoric and ambiguity, Supra’s Petition asks the Commission to find that after nearly two years of FPSC proceedings, in which the FPSC staff and commissioners worked tirelessly to address every issue placed before them,⁵ the FPSC failed to do its job. Nothing could be further from the truth. The FPSC reached a final decision on every issue and issued orders to reflect its decisions. As the facts set forth below will discuss in detail, the FPSC arbitrated all unresolved issues and issued an order resolving those issues; ordered that an executed agreement be filed with the FPSC that conformed to the FPSC’s findings and the negotiated resolution of issues reached by the parties; reviewed the agreement to ensure that it

² *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999).

³ *Id.*

⁴ Indeed, the Commission has never, preempted a state commission about an explicit statement by the state commission that it will not Act.

⁵ BellSouth attaches as Exhibit A the Document Index for the BellSouth/Supra Arbitration. The *index* of documents filed in the proceeding is over 60 pages.

did conform to these findings and resolutions; and after the parties signed the New Agreement,⁶ the FPSC issued an order administratively approving the New Agreement. Considering these facts, Supra's claim that the FPSC did not fulfill its job under section 252 is completely without merit. Pursuant to the discussion set forth below, the Commission must, as a matter of law, deny Supra's request.

Realizing that it had no plausible argument to contend that the FPSC had failed to act, Supra invented a "theory" by which it claims that language to reflect issues that were agreed to by the parties, which were not arbitrated by the FPSC, did not get placed into the agreement. The basis for this alleged failure is nine issues that were on Supra's original issues list that were later resolved by negotiation or that Supra unilaterally withdrew.⁷ This theory does not save Supra's Petition. First, the facts show these claims to be false. Not only was the language the parties agreed to for resolution of the issues included in the agreement approved by the FPSC, the only time Supra raised this theory as a concern to the FPSC was in a filing on July 15, 2002, the date the FPSC had order Supra to signed the agreement. Clearly, the theory was merely a ploy to avoid signing the New Agreement. Indeed, the FPSC considered the legitimacy of Supra's claims and rejected them in its *Final Order*⁸ issued on August 9, 2002. Second, even if

⁶ A copy of the executed agreement is attached as Exhibit B ("New Agreement"). Prior to executing the New Agreement, BellSouth and Supra operated under an agreement that had expired in June of 2000 ("Expired Agreement"). Pursuant to the Expired Agreement's terms, however, the parties continued to operate under that agreement until the FPSC approved the New Agreement.

⁷ Supra insinuates that other disputes "may also exist," (Petition ¶ 36) but has limited its attack on the FPSC's alleged failure to act on only nine issues. See Petition ¶¶ 35 and 57. BellSouth has limited its Response to only those nine issues as it cannot respond to what Supra alleges "may" have occurred.

⁸ Order No. PSC-02-1096-FOF-TP, which memorialized the decisions made at the August 6, 2002 agenda conference. A copy of the *Final Order* is attached as Exhibit C.

the claims were true – which they are not – the mere fact that the FPSC considered them and acted on them is all that is required for it to fulfill its responsibilities under section 252 of the Act. Its underlying reasoning for reaching its action cannot be second-guessed by the Commission. Once the FPSC acts, Supra's remedy is in federal court and it is barred from seeking preemption.

Finally, before diving into the minutia of facts that make up this long and arduous negotiation process, the Commission must keep the following facts ever mindful. First, the Commission must be aware of Supra's motive in seeking every avenue it can to avoid proceeding under the New Agreement. Supra has manipulated the terms of the Expired Agreement into a practice of not paying BellSouth for services received until ordered to do so by the appropriate authority. Under the New Agreement, Supra is no longer able to ignore its payment obligations to BellSouth without fear of repercussion. Under the New Agreement, Supra is required to pay BellSouth all undisputed amounts, or face disconnection of service. Faced with the eventual inability to continue to pocket money it receives from its end users instead of paying BellSouth, Supra has and will do or say anything, including filing multiple, baseless motions and requests for delay to put off the day it must pay BellSouth for services received.⁹

Indeed, Supra has fought this process from every possible venue – the FPSC, State Courts of Florida, and United States District Court – and the Commission is now one more stop in the venue parade. This Petition is nothing more than an attempt to make a farce of the state

⁹ These statements include the inaccurate representation that Supra's 350,000 customers would be will be without local phone service if it is required to sign the New Agreement and the Expired Agreement is terminated as required by the FPSC. Unsurprisingly, Supra has signed the New Agreement and continues to provide service to its customers.

negotiation/arbitration process. By granting it, the Commission would be allowing Supra to ignore the FPSC's decision and conduct its arbitration according to its own rules and procedures.

Second, both Supra and BellSouth signed the New Agreement. It is a 593 page interconnection agreement that covers every possible aspect of the relationship between the parties. Within the New Agreement, of the nine issues that Supra alleges the FPSC failed to act on, Supra and BellSouth agreed to language to settle five of the issues entirely – issues 7, 13, 25B, 27 and 53 – and one of the issues partially – issue 18. As discussed more thoroughly in section IV, Supra filed language with the FPSC memorializing the agreement of these, as well as other, issues on October 26, 2001. The language filed by Supra appears almost verbatim in the New Agreement. The few minor changes in the Supra filed document and the New Agreement were changes requested by Supra. Supra unilaterally withdrew three of the remaining issues at an issue identification meeting with the FPSC – issues 6, 37, and 56. The remainder of issue 18 and issue 57 were arbitrated by the FPSC and settled in the *Arbitration Order* issued by the FPSC on March 26, 2002. The ruling of the FPSC on these issues was included in the New Agreement. Thus, every issue that Supra claims the FPSC failed to act on is covered in the New Agreement.

II. Factual Background

A complete and accurate history of the facts demonstrate that the FPSC acted fully in its responsibilities. Pursuant to the Act, incumbent local telephone exchange carriers (“ILEC”), like BellSouth, are required to negotiate “interconnection agreements” with new, competitive local

exchange carriers (“CLEC”), like Supra. Both parties are required under the Act to negotiate in good faith to achieve the Act’s goal of increasing competition for local telephone service.¹⁰

Briefly, pursuant to the Act agreements for interconnection can be formed in two ways: voluntary negotiation or compulsory arbitration. Specifically, the two parties may enter into a voluntary agreement to effectuate the rates, terms, and conditions of interconnection.¹¹

Alternatively, under the Act, a state public service commission, in this case the FPSC, is empowered to resolve issues that the parties cannot agree on through arbitration.¹² Under the latter scenario, the FPSC will conduct a hearing and will resolve any issue in dispute and provide a schedule for implementation of its ruling.¹³ After an agreement is adopted by either negotiation or arbitration, the agreement must be submitted to the FPSC for approval, even if the agreement was a product of an arbitration conducted by the FPSC.¹⁴

Prior to the New Agreement, Supra and BellSouth had been operating under the BellSouth/AT&T Agreement that the FPSC had approved in 1997 and Supra adopted in 1999. That Agreement expired in June of 2000. Pursuant to its terms, the parties continued to operate under the Expired Agreement until the FPSC approved the New Agreement. In September 2000, BellSouth requested that the FPSC arbitrate certain disputed issues pursuant to the Act. In its arbitration petition, BellSouth attached a copy of the proposed agreement it had provided to Supra during negotiations (“Template Agreement”), which was to serve as the basis for the New Agreement once the disputed issues were resolved.

¹⁰ See 47 C.F.R. § 51.301(a) and (b).

¹¹ See 47 U.S.C. § 252(a)(1).

¹² See 47 U.S.C. § 251(a)(2).

¹³ See 47 U.S.C. § 252(c).

¹⁴ See 47 U.S.C. § 252(e)(1).

Through meetings and negotiation, Supra withdrew some of its original issues and the parties reached resolution on many others. On September 23, 2001, Supra's proposed a stipulation to BellSouth that BellSouth believed to be incomplete and inaccurate on some issues. The stipulation proposed by Supra contained unresolved issues and language to which the parties had not yet agreed.¹⁵ Accordingly, on September 24, 2001, BellSouth e-mailed to Supra a proposal containing specific language for the settled issues.¹⁶ Of course, there was no language, nor a need for language, for withdrawn issues. BellSouth also advised Supra of the reasons why BellSouth could not accept Supra's proposal.

By e-mail dated October 25, 2001, BellSouth submitted to Supra a document that memorialized the parties' agreement, and reflected all the settled issues, the proposed language, and BellSouth's specification of where the language should be placed in the BellSouth Template Agreement.¹⁷ Signifying its acceptance and agreement with these resolved and withdrawn issues, Supra filed this document with the FPSC as Supra's resolved issues on October 26, 2001.¹⁸

The FPSC conducted a hearing in September of 2001, and resolved the disputed issues in a March 5, 2002, agenda conference. Based upon the FPSC staff's recommendation and the FPSC's vote, BellSouth prepared and forwarded to Supra, on March 12, 2002, a redlined and clean version of the proposed New Agreement, incorporating the decisions of the FPSC into the Template Agreement. BellSouth also provided a list of all the changes that had been made to

¹⁵ A copy of Supra's proposed stipulations is attached as Exhibit D.

¹⁶ A copy of BellSouth's proposals is attached as Exhibit E.

¹⁷ A copy of BellSouth's resolved issues is attached as Exhibit F.

¹⁸ A copy of Supra's resolved issues filed with the FPSC on October 26, 2001 is attached as Exhibit G.

the Template Agreement.¹⁹ Supra responded on March 15, 2002, stating that it was premature to begin discussing the agreement because the written order had not been issued and the deadlines for filing motions for reconsideration or appeal had not run.²⁰

On March 26, 2002, the FPSC issued its *Arbitration Order*,²¹ which memorialized the vote at the March 5 agenda conference. On March 27, 2002, the day after the release of the *Arbitration Order*, BellSouth again forwarded a redlined and clean version of the revised agreement to Supra, requesting that the parties discuss the proposed agreement so as to meet the FPSC's order that a joint agreement be filed within 30 days. Supra again refused to discuss the agreement, stating that it would not discuss the agreement until after it filed and received an order on a motion for reconsideration and stay.²²

Supra proceeded to file numerous post-hearing motions challenging the FPSC's *Arbitration Order*. At the June 11, 2002 agenda conference, the FPSC resolved these motions. On June 12, 2002, Supra sent a letter to BellSouth requesting to meet to negotiate applicable language.²³ On June 13, 2002, BellSouth again forwarded to Supra a redlined and clean version of the agreement, which had been modified to incorporate the changes in the FPSC's decisions upon reconsideration.²⁴

The parties scheduled a meeting at 10:00 a.m. on June 17, 2002 to discuss the agreement. On June 17, 2002, Mr. David Nilson of Supra and Mark Buechele, Supra's outside counsel, called BellSouth as scheduled. However, Supra was not prepared to discuss the language or any

¹⁹ A copy of this correspondence (without attachments) is attached as Exhibit H.

²⁰ See correspondence from Supra attached hereto as Exhibit I.

²¹ FPSC Order No. PSC-02-0413-FOF-TP ("*Arbitration Order*"). A copy of the *Arbitration Order* is attached as Exhibit J.

²² See correspondence from Supra attached hereto as Exhibit K.

²³ See correspondence from Supra attached hereto as Exhibit L.

²⁴ See correspondence from BellSouth attached hereto as Exhibit M.

substantive issues. Supra requested that BellSouth provide a list of each issue and the section in the agreement where each such issue is addressed. Despite the fact that BellSouth had already prepared and provided to Supra a list of all changes to each attachment of the agreement, BellSouth agreed to re-send the requested document, which was forwarded to Supra on June 18, 2002.²⁵ In the correspondence transmitting the requested document, BellSouth reiterated that due to the short time frame within which the New Agreement must be filed (14 days after the written decision), BellSouth's representatives were willing to meet each day of the following week if necessary to finalize the document. The parties were scheduled to meet June 24, 2002 to discuss the New Agreement.

On June 24, 2002, Mr. Nilson of Supra called BellSouth at the scheduled time, but was unable to discuss the agreement due to an emergency of outside counsel. Although Mr. Nilson committed to call back later that day to reschedule, there was no further communication that day. The following morning, June 25, Mr. Follensbee of BellSouth sent an e-mail to Mr. Nilson, expressing concern over the parties' lack of progress and offering to reschedule the meeting for June 27 or 28.²⁶ Mr. Nilson responded that Mr. Buechele would be available Friday morning, June 28, to discuss a limited number of issues, and that both of them would be available on Monday, July 1.²⁷ On June 28, Mr. Buechele discussed only two issues.²⁸

²⁵ A copy of this correspondence (without attachments) is attached hereto as Exhibit N.

²⁶ See Exhibit O.

²⁷ See Exhibit P.

²⁸ See Exhibit Q.

On July 1, 2002, the FPSC issued its *Reconsideration Order*²⁹ memorializing the decisions made at the June 11, 2002 agenda conference. The FPSC ordered the parties to submit an executed interconnection agreement for FPSC approval by July 15, 2002.³⁰

On Monday, July 1st Mr. Buechele called as the parties had scheduled. However, Mr. Nilson was not available for the call. Again, Mr. Buechele was not prepared to discuss any issues or any language in the agreement. He asked BellSouth to provide documentation of issues the parties had voluntarily resolved or closed, and BellSouth agreed to provide an October 2001 e-mail outlining language that the parties had negotiated to close some of the arbitration issues. Mr. Buechele indicated that he would review that document and call back later that afternoon. When Mr. Buechele called back, he asked for documentation regarding issues that had been closed prior to the hearing in this arbitration. Again, Mr. Buechele would not or could not discuss any portion of the agreement. The call was terminated, and Mr. Buechele agreed to reschedule a meeting for the afternoon of Wednesday, July 3. BellSouth then forwarded to Mr. Buechele documentation regarding issues that were withdrawn at issue identification and at the June 6, 2001 intercompany review board meeting.³¹

On July 3, 2002, Mr. Buechele discussed Issues A, B, 1, 2, 7, 9 and 13 (the parties had previously discussed Issue 1 on June 28). Five of these seven issues had been either withdrawn by Supra or resolved by the parties prior to the arbitration. Mr. Buechele requested minor

²⁹ FPSC Order No. PSC-02-0878-FOF-TP ("*Reconsideration Order*"). A copy of the *Reconsideration Order* is attached as Exhibit R.

³⁰ *Id.*

³¹ See Exhibit S.

changes to language BellSouth had inserted for the resolved issues, and thereafter agreed on all issues discussed except for Issue 1.³²

The parties met again July 5, 8, 10, 11, and 12, 2002. Mr. Buechele continued to discuss almost exclusively issues that had been previously withdrawn or settled until July 11.³³ As of July 15, 2002, Mr. Buechele had discussed all of the issues that were resolved or withdrawn, in whole or in part, based upon language to which parties had agreed prior to the arbitration. He had discussed only 12 out of the 31 issues that were the subject of the FPSC's *Arbitration Order*.

Pursuant to the FPSC's July 1, 2002 Order, BellSouth signed and submitted a proposed agreement for FPSC approval on July 15, 2002. Supra refused to sign the agreement and instead filed a motion with the FPSC requesting that BellSouth continue to negotiate.³⁴ BellSouth also filed an emergency pleading with the FPSC, requesting the FPSC to order Supra (1) to sign the new agreement; (2) to opt into another agreement entered into by BellSouth and approved by the FPSC pursuant to section 252(i) of the Act; or (3) to declare the 1999 expired Agreement terminated and null and void if Supra did not take either one of the above actions within a certain time period. In support of this relief, BellSouth cited to a decision by the California Public Utilities Commission involving Supra and its refusal to enter into a new agreement with another ILEC.³⁵

³² See Exhibit T.

³³ Mr. Buechele discussed Issue I on June 28; Issue B on July 3; and Issue 4 on July 10. Mr. Buechele discussed three issues from the Order on July 11, and he discussed five Ordered issues on July 12. See Exhibit U.

³⁴ See Exhibit V.

³⁵ See *Petition of Pacific Bell Telephone Co. for Arbitration of an Interconnection Agreement with Supra Telecom. & Inf. Syst., Inc.*, Decision No. 01-06073 (June 28, 2001) (Exhibit W).

The FPSC issued its *Final Order*, which memorialized the vote at the August 6th agenda conference, wherein it, among other things, (1) denied Supra's motion to continue negotiations; and (2) ordered the parties to sign a new agreement within 10 days of its decision at the August 6th agenda conference. The FPSC also ordered that, if Supra did not sign the agreement within this 10 day time period, the 1999 Agreement would be deemed terminated, with Supra having the option to adopt another approved agreement. Supra signed the New Agreement on August 16, 2002, with effective date of the New Agreement being July 15, 2002.

III. Supra's Request for Preemption Must Fail As a Matter Of Law

section 252(e)(5) and (6) is very clear on when, and only when, the Commission may preempt a state public service commission's jurisdiction. Such a situation occurs only when a "State commission fails to act to carry out its responsibility under [section 252 of the Act]."³⁶ It is evident from the above facts that the FPSC did its job and met its responsibilities under section 252. Indeed, it is preposterous for Supra to suggest otherwise. Not only did the FPSC allow the parties to present evidence on every unresolved issue, it conducted a full evidentiary hearing and issued a complete order addressing every issue presented to the FPSC as needing resolution. Moreover, the FPSC addressed every motion presented by both parties. Once it had disposed of every open matter, the FPSC issued its *Final Order* requiring the parties to file an executed interconnection agreement that conformed to the parties' negotiated agreements and the FPSC's orders. Subsequent to the FPSC issuing its *Final Order*, Supra signed the New Agreement and it was approved by the FPSC. Supra is operating under that agreement today. Under these facts the law is clear and the Commission must deny Supra's Petition.

³⁶ 47 U.S.C. § 252(e)(5).

A. The FPSC Took Final Action on All Unresolved Issues That Were a Part of the Arbitration and Has Fulfilled All of Its Responsibilities Under section 252 of the Act

The Act is very specific regarding jurisdiction of interconnection agreements pursuant to section 252 and jealously guards a state commission's authority under section 252. The Commission has long recognized the limits of section 252. In first addressing this subject the Commission found that it "will not take an expansive view of what constitutes a state's 'failure to act.' Instead, the Commission interprets 'failure to act' to mean a state's failure to complete its duties in a timely manner."³⁷ Indeed, the Commission "has effectively construed § 252(e)(5) as *not* covering situations where a state agency affirmatively acts to dispose of a case, and in so doing at least purports to resolve the issues presented to it."³⁸ In this case not only did the FPSC purport to resolve all issues presented to it; it actually did resolve all issues presented to it.

The current situation is analogous to the Commission's decision in *Global NAPs I*.³⁹ In *Global NAPs I*, GNAPs and Bell Atlantic were unable to reach an agreement for interconnection and GNAPs filed a petition for arbitration with the New Jersey Board ("NJB"). The NJB selected an arbitrator and the parties presented a joint statement of issues to the arbitrator. After the arbitration, the parties could not agree on the wording necessary to implement the arbitrator's decision regarding reciprocal compensation for ISP traffic in the light of the Commission's *GTE*

³⁷ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, et al.*, CC Docket No. 96-98, *et al.*, *First Report and Order*, 11 FCC Rcd 15499, 16128, ¶ 1285.

³⁸ *Global NAPs, Inc. v. FCC*, 291 F.3d 832, 837 (D.C. Cir. 2002) (emphasis added).

³⁹ *In the Matter of Global NAPs, Inc., Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, *Memorandum Opinion and Order*, 14 FCC Rcd 12530 (1999) ("*Global NAPs I*").

ADSL Order.⁴⁰ Both parties eventually filed their own version of the agreement in November of 1998. The agreement went unsigned while the NJB decided which agreement was correct. In May of 1999, GNAPs filed a petition of preemption with the Commission. On July 12, 1999 the NJB released a final order completing the GNAPs/Bell Atlantic arbitration proceeding.

The Commission denied GNAPs petition finding that the NJB's action mooted the need for Commission preemption. The Commission stated "[w]hile we have a duty to assume 'responsibility' when a state commission 'fails to act,' after the [NJB's] July 12, 1999 final order there is no further 'responsibility' left for the Commission to assume."⁴¹ The Commission went on to find that "[s]ection 252(e)(5) also suggests that the Commission should avoid assuming jurisdiction over a completed state proceeding." The Commission stated "[w]hen state action is fully completed. . . , we find it hard to conclude that Congress nevertheless, intended that we must assume jurisdiction, which would have the effect of delaying resolution of the proceeding rather than expediting it. Such a result would seem at odds with the intent of this provision to provide a mechanism to ensure prompt resolution of these disputes."⁴²

The irony of Supra's Petition is that the FPSC issued a final order prior to Supra filing its Petition. Moreover, not only has the FPSC issued a final order, Supra and BellSouth have signed an interconnection agreement that Supra is operating under today. Supra does not – and cannot –

⁴⁰ *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1; GTOC Transmittal No. 1148*, CC Docket No. 98-79, *Memorandum Opinion and Order*, 13 FCC Rcd 22466 (1998) ("*GTE ADSL Order*").

⁴¹ *Global NAPs I*, 14 FCC Rcd at 12538, ¶17.

⁴² *Id.*, at 12538-39, ¶ 18. Indeed, if the Commission accepts Supra's request for preemption, state commissions would face never-ending arbitration proceedings. A party unwilling to sign an agreement could simply claim, on the day the agreement was ordered to be signed, that it now disputed issues to which the parties had previously negotiated a resolution (just as Supra is doing in this proceeding). This would force the state commission to begin the process over. As the Commission found, section 252(e)(5) was intended to expedite proceedings, not delay them.

deny these facts. Just as in the *Global NAPs I* decision, the FPSC's *Final Order* has rendered Supra's Petition moot. Accordingly, the Commission must deny the Petition.

Supra suggests that the current proceeding is similar to the Commission's decision in *Starpower*⁴³ where the Commission preempted the Virginia public service commission regarding a dispute over inter-carrier compensation. In *Starpower*, Starpower filed a petition with the Virginia PSC seeking declaratory ruling directing GTE to pay reciprocal compensation to Starpower for delivering GTE's traffic to Internet Service Providers ("ISPs") served by Starpower. Subsequent to Starpower filing its petition for preemption, the Virginia PSC issued a "final order declining jurisdiction over Starpower's petition with respect to GTE by stating, '[the Virginia PSC finds that it] should take no action.'"⁴⁴ Indeed, the Virginia PSC specifically "encouraged the parties to seek relief from [the Federal Communications] Commission"⁴⁵ stating "the only practical action is for the [Virginia PSC] to decline jurisdiction and allow the parties to present their cases to the FCC."⁴⁶ After finding that it did have authority to preempt a state commission on matters of interpretation and enforcement of an interconnection agreement, the Commission accepted jurisdiction over the matter stating:

We first note that we are sympathetic to the concerns of the Virginia [PSC] with regard to the status of the law governing inter-carrier compensation for ISP-bound traffic. Because the [Virginia PSC] explicitly declined to take action with respect to Starpower's petitions, however, we are compelled to conclude that the Virginia [PSC] 'failed to carry out its responsibility' under section 252.⁴⁷

⁴³ *In the Matter Starpower Communications, LLC Petition for Preemption of the Jurisdiction of the Virginia State Corporation Commission Pursuant to section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, *Memorandum Opinion and Order*, 15 FCC Rcd 11277 (2000) ("*Starpower*").

⁴⁴ *Id.* at 11278, ¶ 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 11280, ¶ 7.

⁴⁷ *Id.*

Thus, even where a state PSC has specifically declined jurisdiction and even encouraged parties to take their issues to the Commission, the Commission still only reluctantly chose to preempt the state commission.⁴⁸

The facts of *Supra*'s Petition could not be more different from those in *Starpower*. In *Starpower* the Virginia PSC openly chose to decline jurisdiction over a matter. In the current case the FPSC has not only retained jurisdiction over every matter before it, but also has reached a final decision on all such matters. The fact that *Supra* does not like that decision is inapposite to whether the Commission should disenfranchise the FPSC of its authority to decide issues related to interconnection agreements pursuant to section 252. As stated previously, if *Supra* is unhappy with the FPSC's decision it can seek a remedy in federal court.

Surprisingly, *Supra* cites *Global NAPs II*⁴⁹ to support its position. *Global NAPs II*, just like *Global NAPs I*, however, squarely supports the position that the Commission should not preempt the FPSC. In *Global NAPs II*, as in *Global NAPs I*, a dispute arose over the interpretation of a portion of an interconnection agreement regarding "GNAPs' claimed right to

⁴⁸ *Supra* also cites *In the Matter of Petition of WorldCom, Inc., pursuant to section 252(e)(5) of the Communication Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration, et al.*, cc Docket 00-218 et. al., *Memorandum Opinion and Order*, DA 02-1731 (adopted July 17, 2002) ("WorldCom") to support its request. *WorldCom*, however, also involved a situation where the state commission *explicitly refused* to arbitrate the terms and conditions of an interconnection agreement. The Virginia PSC contended that it could not apply federal standards in interconnection arbitrations without potentially waving its Eleventh Amendment sovereign immunity. Therefore, it refused to take action. Just as with *Starpower*, this *WorldCom* is irrelevant to the current situation where the FPSC worked very diligently to fulfill every obligation under section 252.

⁴⁹ *In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket 99-354, *Memorandum Opinion and Order*, 15 FCC Rcd 4943 (2000) ("*Global NAPs II*").

receive compensation payments for calls that Bell Atlantic customers make to ISPs.”⁵⁰ In April of 1999, GNAPs filed a complaint with the Massachusetts Department of Telecommunications and Energy (“DTE”) concerning the proper interpretation of the agreement. The DTE had not issued a decision on the matter by December of 1999, so GNAPs filed a petition with the Commission asking the Commission to preempt the DTE for not responding within the 90-day time limit. Prior to the Commission ruling on GNAPs’ preemption petition, “the DTE affirmed a prior order that had vacated its requirement that Bell Atlantic make reciprocal compensation payments for traffic that competitive LECs terminate to ISPs.”⁵¹ The DTE determined that “[b]ecause the interconnection agreement at issue in the DTE’s prior order was identical in all material respects to GNAPs’ agreement with Bell Atlantic, the DTE also dismissed GNAPs’ complaint and demand for reciprocal compensation from Bell Atlantic as moot.”⁵²

The Commission refused to preempt the DTE because the DTE had already decided the issue. The Commission found that “assumption of jurisdiction over the already-completed Massachusetts GNAPs/Bell Atlantic interconnection dispute is unwarranted in these circumstances and, accordingly, deny GNAPs’ petition.”⁵³

Significantly, the Commission also stated:

We also reject GNAPs’ recent argument that the DTE, by dismissing GNAPs’ complaint as moot, did not fulfill its responsibilities under section 252(e)(5) because it did not decide whether compensation for ISP-bound calls is due under the specific interconnection agreement at issue, include that of GNAPs. *As we concluded in a prior order under section 252(e)(5), however, ‘Section 51.801 of the Commission’s rules does not focus on the validity of the state commission decisions.’ We therefore do*

⁵⁰ *Id.* at 4944, ¶ 3.

⁵¹ *Id.* at 4946, ¶ 7.

⁵² *Id.*

⁵³ *Id.* at 4946, ¶ 8.

*not see a basis for examining the underlying reasoning of the Massachusetts DTE in determining that GNAPs' complaint is moot.*⁵⁴

The Federal District Court of Appeals affirmed the Commission's decision in *Global NAPs, Inc. v. FCC*.⁵⁵ The court agreed with the Commission on two important points. First, it held that the Commission's authority to preempt a state is limited to matters where the state commission fails to act, stating "[o]therwise – such as where the state agency actually 'makes a determination' under § 252 – there is no statutory basis for FCC preemption. Under such circumstances, an aggrieved party may bring an action for judicial review in federal court under § 252(e)(6). . . ."⁵⁶ Second, the court affirmed that section 252(e)(5) does not allow the Commission to second guess the state commission's underlying reasoning for its decision. Both of these points are directly relevant to Supra's Petition.

Despite Supra's characterization of the FPSC's *Final Order*, which rejected Supra's request for reopening already resolved issues and required the filing of the New Agreement on a date certain, as no action, it was clearly an action taken by the FPSC to finalize the arbitration proceeding and fulfill its responsibilities under section 252. The FPSC's *Final Order* was based on sound reasoning and proper factual and legal analysis. By taking that action, the FPSC fulfilled its responsibilities under section 252 of the Act and, accordingly, the Commission has no statutory basis for preemption.

Moreover, even if the Commission accepted as true Supra's specious allegations that some issues remain unresolved, it still could not preempt the FPSC decision. The FPSC clearly considered the arguments of Supra and denied them. The FPSC's analysis is set out in the

⁵⁴ *Id.* at 4947, ¶ 9 (emphasis added).

⁵⁵ *Global NAPs, Inc. v. FCC*, 291 F.3d 832 (D.C. Cir. 2002).

⁵⁶ *Id.* at 836.

August 9, 2002 *Final Order* denying Supra's July 15, 2002 Motion seeking extended negotiation. Simply put, the FPSC believed that if Supra had a legitimate argument regarding its allegations that some issues remained unresolved, Supra should have taken the time to specifically identify the disputes and offer its own language that Supra believed to accurately reflect the appropriate resolution. Because Supra had offered nothing but a belated objection to the proposed New Agreement language, the FPSC simply ruled against Supra's request. This ruling can hardly be deemed an "inaction."⁵⁷ The FPSC clearly has authority to decide issues based on the facts before it; and that is exactly what it did. Supra may not like that decision; however, the answer to its dissatisfaction is not for the Commission to usurp the FPSC's jurisdiction. Instead, the Act provided other remedies to parties who disagree with a state Commission's action.

B. Supra's Efforts to Overcome the Fact That The FPSC Fulfilled Its Responsibilities Under section 252 Are Not Credible or Relevant

Supra, realizing that it has no basis in law or fact to support a claim that the FPSC failed to act in this proceeding, attempts to circumvent the law by alleging that the FPSC issued its *Final Order* even though some issues remained unresolved. This concocted eleventh-hour theory alleges that issues Supra and BellSouth represented to the FPSC as being resolved were not actually resolved. Specifically, Supra alleged that BellSouth unilaterally reneged on agreements it had previously made to resolve some of the issues. The facts show these allegations to be nothing more than Supra's latest maneuver to avoid signing the New Agreement.

⁵⁷ See *Global NAPs, Inc.*, 291 F3d 832, 837 ("Even if the state agency's dismissal was premised on faulty or incomprehensible legal reasoning, it nonetheless constituted final action disposing of GNAPs' complaint.")

1. Supra's Allegations That BellSouth Did Not Include Language in the New Agreement To Reflect the Parties' Agreement On Resolved Issues Are Completely Without Merit

Realizing that it had reached the end of its stall-and-delay rope, Supra made up allegations that BellSouth did not include language in the New Agreement to reflect the agreements the parties had reached on several resolved issues. The more timing of Supra's raising this issue calls its legitimacy into question. Only after the September 2001 hearing, the issuance of the FPSC's March 25, 2002 *Arbitration Order*, and the resolution of Supra's numerous motions for reconsideration did Supra claim that the issues the parties had previously settled should be arbitrated. In fact, it was not until Supra filed its motion to compel further negotiations on July 15, 2002, which is the date the Commission ordered the parties to execute the New Agreement, that Supra raised this issue.

In its Petition, Supra claims "BellSouth's position is that Supra must accept language BellSouth has unilaterally chosen to implement the unresolved issues."⁵⁸ The documented facts render this statement literally unbelievable. Supra had a copy of the template language at the outset of the arbitration proceeding and at no point in the process did Supra submit a template of its own. From mid-2000 through the time that the FPSC issued its *Arbitration Order* in March 2002, Supra did not express any concern that the language in the template was inconsistent with the manner in which some of the issues had been resolved between the parties. Following the release of the FPSC's *Arbitration Order*, BellSouth again submitted the template to Supra, this time incorporating the Commission's ruling on the thirty-one (31) issues addressed in the *Arbitration Order*. Again, Supra voiced no objection to the language on the non-arbitrated issues. Following the release of the FPSC's *Reconsideration Order* in June 2002, BellSouth

⁵⁸ Petition ¶ 46.

again submitted the template to Supra, this time incorporating the Commission's ruling on the four issues addressed in the *Reconsideration Order*. Again, Supra did not raise any issue as to the language in the template reflecting the parties' prior agreements. On July 15, 2002, the day that the Commission set as the deadline for the parties to submit the executed New Agreement, Supra raised, for the first time, this issue surrounding the language incorporating the resolved issues into the New Agreement.

The issues Supra now claim remain in dispute were resolved and the resolution for each such issue was memorialized to the agreement of both parties. This is evident by the language Supra filed with the FPSC on October 26, 2001 – language that both it and BellSouth agreed resolved the issues. It is also evident by the fact that at no time did Supra complain to the FPSC that the language in the New Agreement, which Supra had a undated copy of after every revision, did not reflect the agreement of the parties except and until it became obvious that Supra needed another stall plan. At that point, July 15, 2002, the day the FPSC had ordered Supra to sign the agreement, Supra made its first allegation to the FPSC that the language in the agreement was improper.

Supra clearly knew all issues that it had withdrawn, of which no language was included in the agreement, and had the language that both sides agreed to for resolution of the resolved issues. If Supra had a legitimate complaint that the language in the agreement did not properly reflect the parties' agreement it could have raised these concerns with the FPSC on a timely basis. By waiting until the day the FPSC had ordered Supra to sign the New Agreement proves that Supra's claims are contrived solely for the purpose of delay.

2. The FPSC Has No Obligation to Attempt to Alter or Reach a Different Conclusion on Resolved Issues

It is evident, based on the above facts, that BellSouth in no way manipulated the language from what both Supra and BellSouth agreed to resolve the unarbitrated issues. The FPSC realized this and that is why it denied Supra's request to continue the negotiation and arbitration proceeding and issued its *Final Order* requiring the parties to sign the New Agreement. The only question that remains for the Commission is whether the FPSC had some obligation, as Supra alleges, to arbitrate and offer a resolution to issues that had been resolved by the parties. The answer is obviously no.

In its Petition, Supra states that "[o]n March 26, 2002, the FPSC entered an order in which the FPSC resolved only those issues which the parties' had presented at the evidentiary hearing."⁵⁹ This statement hardly needs response. Of course the FPSC only resolved those issues that were presented at the evidentiary hearing because all other issues had been resolved by negotiation or were unilaterally withdrawn by Supra. It makes absolutely no sense to suggest that the FPSC should spend its scarce resources expanding the scope of the evidence and adding additional hearing time and order preparation time to attempt to resolve issues that have been negotiated and closed by the parties or were unilaterally withdrawn by Supra. Such a suggestion is nonsensical.

Moreover, this argument ignores the fact that the Commission, pursuant to §252(b)(4), can only arbitrate *unresolved* issues raised in the arbitration petition and response thereto. The Act is unambiguous that "[t]he State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)."⁶⁰ The state commission also has the ability to

⁵⁹ Petition ¶ 29 (emphasis in original).

⁶⁰ 47 U.S.C. §252(b)(4)(A).

“require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the *unresolved* issues.”⁶¹ The Act does not contemplate that the state commission will be required to consider, through the arbitration process, issues that have been resolved by the parties. Thus, the FPSC cannot possibly have failed to act to carry out its responsibilities under section 252 by failing to consider issues that the Act does not require the FPSC to consider in the first instance.

C. Supra’s Actions Reveal That It Seeks Relief From FPSC’s Decision and Not Preemption For the FPSC’s Alleged Failure to Act

A state public service commission decision is final and any disagreement with that decision must be brought in federal court and not through a preemption petition with the Commission. Supra is well aware that the FPSC acted to fulfill its responsibilities pursuant to section 252 of the Act. Indeed, Supra’s actions reflect what it knows to be true – that the FPSC did fulfill its responsibilities under section 252 of the Act. After it became evident that Supra would be required to enter the New Agreement as ordered by the FPSC, Supra filed a motion for injunctive relief in the District Court for the Northern District of Florida, Tallahassee Division. Supra was seeking a temporary restraining order (“TRO”) to stop the FPSC’s *Final Order* from going into effect. The District Court quickly denied Supra’s request finding that Supra would not be irreparably harmed by allowing the *Final Order* going into effect and Supra signing the New Agreement. The Court simply saw this as a contractual dispute and a matter of which Supra could appeal to the federal district court for any grievance it had with the FPSC’s *Final Order* and the New Agreement.

⁶¹ *Id.* § 252(b)(4)(B) (emphasis added).

Since the denial of the TRO, on information and belief, BellSouth understands that Supra will seek to convert the motion for injunctive relief into an appeal of the FPSC's *Final Order* and approval of the New Agreement. This proceeding squarely places Supra in federal district court with a grievance over a final action taken by the FPSC. Supra cannot have it both ways. If its argument is that the FPSC has failed to act, then the *exclusive* jurisdiction for its claim is the petition for preemption filed with the Commission.⁶² By filing an action in the federal district court, however, Supra will acknowledge that the FPSC has acted and Supra is appealing that action. Accordingly, if Supra does file to amend its injunction relief filing to an appeal, Supra would be judicially estopped from pursuing its Petition before the Commission.

IV. Supra Must Not Be Allowed to Profit From Its Own Gamesmanship of The System

As shown above, the Commission cannot, by law, preempt the FPSC in this proceeding. Indeed, the FPSC has issued its *Final Order*; the parties have signed an agreement; the matter is moot. BellSouth believes it important for the Commission to fully understand the banality of Supra's request, however. Specifically, the Commission should not be concerned that Supra's ability to conduct business will be impaired in any way because of the issues it raised as being unresolved.

Supra states that the focus of its Petition "revolves around the nine (9) specific issues [that] the FPSC refused to resolve."⁶³ As discussed above, for all of the issues that Supra alleges remain unresolved, each was the subject of negotiation. For each such issue, the parties reached settlement or Supra unilaterally withdrew the issue. For those that the parties resolved, language was memorized to reflect that resolution. BellSouth and Supra agreed to the language and Supra

⁶² 47 U.S.C. § 252(e)(5).

⁶³ Petition ¶ 35.

filed a document with the FPSC on October 26, 2001 with a cover letter that states “Supra Telecommunications and Information Systems, Inc.’s (Supra Telecom) resolved issues in [Docket 001305-TP (Supra Telecom – BellSouth Arbitration)].” The document is entitled “BellSouth/Supra Arbitration *Resolved* Issues.”⁶⁴

The Summary of that document states:⁶⁵

Thirteen (13) issues were either withdrawn at Issue Identification or were withdrawn or resolved during the Intercompany Review Board meeting in June. These are 2, 3, **6**, 30, 36, **37**, 39, 43, 50, 54, **56**, 58 and 64.

Twenty (20) issues were either withdrawn or resolved during the mediation, the hearing or in subsequent meetings thereafter. These are A, 7, 9, **13**, 14, 17, 25A, **25B**, 26, **27**, 31, 35, 41, 44, 45, 48, 51, 52, **53** and 55. *The language to which the Parties agreed in settlement of these issues is set forth below.* However, the Parties have not agreed to the placement of the language in the interconnection agreement. This will be determined in part when the Commission issues an order regarding Issue B.

Two (2) issues have been resolved in part, thus narrowing the issue to be decided by the Commission. These are issues **18**⁶⁶ and **57**.

The document then presents the language for each issue in which the parties had reached agreement to settle. BellSouth prepared a matrix⁶⁷ that shows a comparison between the language that Supra filed with the FPSC in the October 26, 2001 document and the language that actually appears in the New Agreement, including references to the place in the New Agreement that the language was placed. As the Commission can see by this matrix, the language is virtually identical to the language Supra filed with the FPSC that Supra represented to be

⁶⁴ See Exhibit G (emphasis added).

⁶⁵ The issues emphasized in bold and italics are the issues that Supra contends remain in dispute and are the basis for its Petition.

⁶⁶ The Parties agreed to rates for resale services and collocation. The remaining rates were arbitrated by the FPSC. The findings of the FPSC were incorporated into the New Agreement. *See Arbitration Order* at Issue J.

⁶⁷ A copy of the Matrix is attached as Exhibit X.

“language to which the Parties agreed in settlement of these issues.” This comparison demonstrates Supra’s disingenuous claims in its Petition.

As for the remaining issues – 6, 37, and 53 – Supra unilaterally withdrew these issues and, therefore, no language is included in the New Agreement. Issue 6 initially requested access to BellSouth’s Regional Service Address Guide (“RSAG”) database. This issue was virtually the same as issue 57, which addressed whether Supra could have access to RSAG and the Loop Facility Assignment Control System (“LFACS”) without separate license agreements. Accordingly, Supra withdrew issue 6 because it was incorporated in issue 57. The FPSC arbitrated issue 57 and ruled that Supra may not download these databases unless the parties agreed to do so through a separate license agreement.⁶⁸ Because the FPSC did not require BellSouth to provide Supra a download of RSAG, there is no need for language to be included in the New Agreement. The FPSC did note that the parties may, if they so choose, enter into a separate license agreement for downloading the RSAG database. This, of course, would require a completely separate agreement. It is not necessary to include an agreement to agree in the New Agreement.

Issue 37 related to how BellSouth would bill Supra for the provision of power to Supra’s collocation space. Supra alleged in its filing with the FPSC that it withdrew the issue only on the grounds that BellSouth had been ordered in one state to install meters to bill only a metered rate for electricity and that BellSouth would include language in the New Agreement to reflect the same arrangement. BellSouth made no such representation or agreement with Supra. The reason

⁶⁸ *Arbitration Order* page 136. It is important to note that the New Agreement allows Supra access to the RSAG database to use. The New Agreement merely limits its ability to download the entire database.

Supra withdrew this issue, however, is because the rates for collocation were a part of issue 18 that the parties resolved.⁶⁹ BellSouth incorporated the resolved rates into the New Agreement.⁷⁰

Issue 56 seeks a service inquiry process as a pre-ordering function. Just as with issue 6 and 37, Supra unilaterally withdrew this issue and no language is available. BellSouth does not provide a service inquiry process as a pre-ordering function for any carrier. Supra indicated that its withdrawal of the issue was predicated on BellSouth allowing Supra to have access to the EDI interfaces being used by MCI. BellSouth made no such representation or agreement with Supra. The New Agreement allows Supra access to the same EDI that MCI enjoys today. Moreover, to the extent Supra desires to incorporate the provision of MCI's agreement regarding EDI into the New Agreement, it is free to do so.

This discussion demonstrates that all of Supra's issues have been addressed in the New Agreement. Each of the resolutions was the product of agreement between Supra and BellSouth or Supra's withdrawal of the issue. Accordingly, even if the Commission believed it could ignore the law established in section 252, and its own precedent in construing that law, in order to right an alleged wrong, there is no reason to do that here. The New Agreement does not leave Supra for want of any interconnection need. Moreover, the New Agreement accurately reflects Supra's agreements with BellSouth or arbitrated decisions of the FPSC.

V. If the Commission Grants Supra's Petition – Which It Should Not – the Remedy Would Be Limited To Resolving the Nine Alleged Disputed Issues and Incorporating Them Into the New Agreement

Finally, if the Commission does find that the FPSC failed to act – which is not the case – the only conceivable failure even alleged by Supra is in the nine issues that Supra claims remain

⁶⁹ See Matrix, Exhibit X at issue 18.

⁷⁰ See Exhibit B, New Agreement, and specifically Exhibit 3, Attachment 4, Exhibit A, thereto.

in dispute. Accordingly, the Commission must not interfere with the New Agreement, but should assume jurisdiction only over the arbitration of the nine specific issues. Any difference between the findings of such arbitration and the New Agreement could be incorporated into the New Agreement.

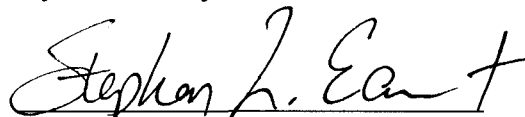
VI. Conclusion

Since the passing of the Act, the Commission has held sacrosanct the jurisdictional line between itself and state commissions concerning obligations under section 252. Only when a state commission explicitly states that it will not act under section 252 has the Commission exercised jurisdiction over carrier interconnection agreements. In this case, the FPSC has done just the opposite. Through hearings and numerous orders, the FPSC has explicitly acted to fulfill its obligation. Any interference by the Commission of the FPSC's actions would exceed the bonds of section 252(e)(5). This would be especially true in the current situation where the facts clearly do not support Supra's allegations that make up the basis for its request. Accordingly, the Commission should deny Supra's Petition.

Respectfully submitted,

BELLSOUTH CORPORATION

By its Attorneys



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Date: September 20, 2002

ATTACHMENT 1

**Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

AFFIDAVIT OF GREGORY R. FOLLENSBEE

STATE OF GEORGIA
FULTON COUNTY

Personally appeared before me, the undersigned officer, duly authorized to administer oaths, Gregory R. Follensbee, who, after first being duly sworn, stated as follows:

1.

My name is Gregory R. Follensbee. I am an employed by BellSouth Telecommunications, Inc. ("BellSouth") as a Senior Director of Interconnection Marketing. In that capacity, I am responsible for negotiating the interconnection agreement on BellSouth's behalf with Supra Telecommunications & Information Systems, Inc. ("Supra"). In such capacity, I have access to business records of BellSouth that document the BellSouth/Supra relationship. I began performing this job on June 15, 2001. I understand that this Affidavit will be used in connection with a Petition filed by Supra requesting the Federal Communications Commission ("Commission") to preempt the Florida Public Service Commission ("FPSC") the regarding Supra and BellSouth's interconnection agreement executed in Florida. I am above the age of majority and I am executing this Affidavit voluntarily.

2.

Prior to the New Agreement that became effective July 15, 2002 (“New Agreement”), Supra and BellSouth had been operating under the BellSouth/AT&T Agreement that the FPSC had approved in 1997 and Supra adopted in 1999. That Agreement expired in June of 2000 (“Expired Agreement”). Pursuant to its terms the parties continued to operate under the Expired Agreement until the FPSC approved the New Agreement. In September 2000, BellSouth requested that the FPSC arbitrate certain disputed issues pursuant to the Telecommunications Act of 1996. In its arbitration petition, BellSouth attached a copy of the proposed agreement it had provided to Supra during negotiations (“Template Agreement”), which was to serve as the basis for the New Agreement once the disputed issues were resolved. Supra filed a Response to BellSouth’s Petition wherein it listed several more disputed issues.

3.

Through meetings and negotiation, Supra withdrew some of its original issues and the parties reached resolution on many others. On September 23, 2001. Supra proposed a stipulation to BellSouth that BellSouth believed to be incomplete and inaccurate on some issues. The stipulation proposed by Supra contained unresolved issues and language to which the parties had not yet agreed. Accordingly, on September 24, 2001, BellSouth e-mailed to Supra a proposal containing specific language for the settled issues. Of course, there was no language, nor a need for language, for withdrawn issues. BellSouth also advised Supra of the reasons why BellSouth could not accept Supra's proposal.

4.

4.

By e-mail dated October 25, 2001, BellSouth submitted to Supra a document that memorialized the parties' agreement, and reflected all the settled issues, the proposed language, and BellSouth's specification of where the language should be placed in the BellSouth Template Agreement. Supra filed this document with the FPSC as Supra's resolved issues on October 26, 2001.

5.

The FPSC conducted a hearing in September of 2001, and resolved the unresolved issues in a March 5, 2002, agenda conference. Based upon the FPSC staff's recommendation and the FPSC's vote, BellSouth prepared and forwarded to Supra, on March 12, 2002, a redlined and clean version of the proposed New Agreement, incorporating the decisions of the FPSC into the Template Agreement. BellSouth also provided a list of all the changes that had been made to the Template Agreement. Supra responded on March 15, 2002, stating that it was premature to begin discussing the agreement because the written order had not been issued and the deadlines for filing motions for reconsideration or appeal had not run.

6.

On March 26, 2002, the FPSC issued its Arbitration Order, which memorialized the vote at the March 5 agenda conference. On March 27, 2002, the day after the release of the Arbitration Order, BellSouth again forwarded a redlined and clean version of the revised agreement to Supra, requesting that the parties discuss the proposed agreement so as to meet the FPSC's order that a joint agreement be filed within 30 days. Supra

again refused to discuss the agreement, stating that it would not discuss the agreement until after it filed and received an order on a motion for reconsideration and stay.

7.

Supra proceeded to file numerous post-hearing motions challenging the FPSC's Arbitration Order. At the June 11, 2002 agenda conference, the FPSC resolved these motions. On June 12, 2002, Supra sent a letter to BellSouth requesting to meet to negotiate applicable language. On June 13, 2002, BellSouth again forwarded to Supra a redlined and clean version of the agreement, which had been modified to incorporate the changes in the FPSC's decisions upon reconsideration.

8.

The parties scheduled a meeting at 10:00 a.m. on June 17, 2002 to discuss the agreement. On June 17, 2002, Mr. David Nilson of Supra and Mark Buechele, Supra's outside counsel, called BellSouth as scheduled. However, Supra was not prepared to discuss the language or any substantive issues. Supra requested that BellSouth provide a list of each issue and the section in the agreement where each such issue is addressed. Despite the fact that BellSouth had already prepared and provided to Supra a list of all changes to each attachment of the agreement, BellSouth agreed to re-send the requested document, which was forwarded to Supra on June 18, 2002. In the correspondence transmitting the requested document, BellSouth reiterated that due to the short time frame within which the New Agreement must be filed (14 days after the written decision), BellSouth's representatives were willing to meet each day of the following week if necessary to finalize the document. The parties were scheduled to meet June 24, 2002 to discuss the New Agreement.

9.

On June 24, 2002, Mr. Nilson of Supra called BellSouth at the scheduled time, but was unable to discuss the agreement due to an emergency of outside counsel. Although Mr. Nilson committed to call back later that day to reschedule, there was no further communication that day. The following morning, June 25, I sent an e-mail to Mr. Nilson, expressing concern over the parties' lack of progress and offering to reschedule the meeting for June 27 or 28. Mr. Nilson responded that Mr. Buechele would be available Friday morning, June 28, to discuss a limited number of issues, and that both of them would be available on Monday, July 1. On June 28, Mr. Buechele discussed only two issues.

10.

On July 1, 2002, the FPSC issued its Reconsideration Order memorializing the decisions made at the June 11, 2002 agenda conference. The FPSC ordered the parties to submit an executed interconnection agreement for FPSC approval by July 15, 2002.

11.

On Monday, July 1, Mr. Buechele called as the parties had scheduled. However, Mr. Nilson was not available for the call. Again, Mr. Buechele was not prepared to discuss any issues or any language in the agreement. He asked BellSouth to provide documentation of issues the parties had voluntarily resolved or closed, and BellSouth agreed to provide an October 2001 e-mail outlining language that the parties had negotiated to close some of the arbitration issues. Mr. Buechele indicated that he would review that document and call back later that afternoon. When Mr. Buechele called back, he asked for documentation regarding issues that had been closed prior to the hearing in

this arbitration. Again, Mr. Buechele would not or could not discuss any portion of the agreement. The call was terminated, and Mr. Buechele agreed to reschedule a meeting for the afternoon of Wednesday, July 3. BellSouth then forwarded to Mr. Buechele documentation regarding issues that were withdrawn at issue identification and at the June 6, 2001 intercompany review board meeting.

12.

On July 3, 2002, Mr. Buechele discussed Issues A, B, 1, 2, 7, 9 and 13 (the parties had previously discussed Issue 1 on June 28). Five of these seven issues had been either withdrawn by Supra or resolved by the parties' prior to the arbitration. Mr. Buechele requested minor changes to language BellSouth had inserted for the resolved issues, and thereafter agreed on all issues discussed except for Issue 1.

13.

The parties met again July 5, 8, 10, 11, and 12, 2002. Mr. Buechele continued to discuss almost exclusively issues that had been previously withdrawn or settled until July 11. As of July 15, 2002, Mr. Buechele had discussed all of the issues that were resolved or withdrawn, in whole or in part, based upon language to which parties had agreed prior to the arbitration. He had discussed only 12 out of the 31 issues that were the subject of the FPSC's Arbitration Order.

14.

Pursuant to the FPSC's July 1, 2002 Order, BellSouth signed and submitted a proposed agreement for FPSC approval on July 15, 2002. Supra refused to sign the agreement and instead filed a motion with the FPSC requesting that BellSouth continue to negotiate. BellSouth also filed an emergency pleading with the FPSC, requesting the

FPSC to order Supra (1) to sign the new agreement; (2) to opt into another agreement entered into by BellSouth and approved by the FPSC pursuant to Section 252(i) of the Act; or (3) to declare the 1999 expired Agreement terminated and null and void if Supra did not take either one of the above actions within a certain time period.

15.

The FPSC issued its Final Order, which memorialized the vote at the August 6th agenda conference, wherein it, among other things, (1) denied Supra's motion to continue negotiations; and (2) ordered the parties to sign a new agreement within 10 days of its decision at the August 6th agenda conference. The FPSC also ordered that, if Supra did not sign the agreement within this 10 day time period, the 1999 Agreement would be deemed terminated, with Supra having the option to adopt another approved agreement. Supra signed the New Agreement on August 16, 2002, with effective date of the New Agreement being July 15, 2002.

FURTHER AFFIANT SAYETH NOT.


Gregory R. Follensbee

Sworn to and subscribed
before me this 20th day
of September, 2002. \


Notary Public

My Commission Expires
(seal)

RUDINE J. DAVIS
Notary Public, Fulton County, Georgia
My Commission Expires May 16, 2006